In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1182

G. RAYMOND ARNETT, as Director of the Department of Fish and Game of the State of California,
Plaintiff and Respondent,

vs.

5 GILL NETS, etc.,
Defendant,

RAYMOND MATTZ,
Intervenor and Petitioner.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

Respondent's Supplementary Brief

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Respondent's Supplementary Brief

The respondent submits this supplementary brief to provide further information on selected points raised in the briefs on file herein.

I. THE DEPARTMENT OF THE INTERIOR AND THE BUREAU OF INDIAN AFFAIRS REGARDED THE 1892 ACT AS TERMINATING THE RESERVATION STATUS OF THE OLD KLAMATH RIVER RESERVATION.

A. The Bureau of Indian Affairs Ceased to Exercise Supervision Over the Old Klamath River Reservation After the 1892 Act.

The petitioner has claimed that the Bureau of Indian Affairs (BIA) has consistently regarded the reservation

status of the former Klamath River Reservation as continuing in effect after the 1892 act. Petitioner's Reply Brief (hereinafter "PRB"), 21-22. In fact, the opposite is true. William B. Dougherty, the Superintendent of Hoopa Valley Agency, reported to the Commissioner of Indian Affairs in 1896,

"[The Indians living on the former Klamath River Reservation] *are now practically freed from administrative control*, and I think it is advisable to favor the development of their transition from Federal supervision to that of municipal authority, although the local government officers ignore the change effected in the political condition of the Indians by federal legislation, . . ." Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs, v. II (1896), p. 125. (Emphasis added.)

The Superintendent noted in the following year that these Indians were subject to the jurisdiction of local governmental bodies; the Indians on the "*old* Klamath River Reservation," he said, were complaining about their treatment by local "municipal officers and courts, . . . *their own law being abolished.*" Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs (1897), p. 115. (Emphasis added.)

Finally, in 1900, William B. Freer, the new Superintendent of the Hoopa Valley Agency, went further and defined the reservation status of the old Klamath River Reservation. He stated,

"*There are two tribes and two reservations under this agency*, viz, the Hupa, living on the Hoopa Valley Reservation proper, and those called the Lower Klamath River Indians, living on the 'Connecting strip,' an extension of the reservation proper. . . . *The extension to the reservation* comprises the land on both sides of the Klamath River within a radius of a mile, and *reaches from the line of the Hoopa Valley Reservation proper to what was the line of*

the old Klamath River Reservation, since thrown open, 20 miles above the mouth of the river." Annual Reports of the Department of the Interior, Indian Affairs, Report of Commissioner and Appendixes (1900), p. 204. (Emphasis added.)

Thus, the Superintendent clearly indicated that the BIA no longer considered the former Klamath River Reservation as in existence after the 1892 act, and that the BIA, beyond administering the trust allotments, no longer supervised these lands as part of the Hoopa Valley extension. This conclusion is also apparent from the fact that the annual reports of the Commissioner of Indian Affairs, after 1896, ceased to discuss the conditions of the Indians on the old Klamath River Reservation, although such conditions were elaborately discussed with respect to Indians on the Hoopa Valley reservation proper and the connecting strip.[1] Obviously the BIA and the Department of the Interior cannot now seek to re-create the old reservation by the simple expedient of issuing maps and statements; certainly these agencies cannot so easily abrogate the power of California to enforce its fishing laws on the Klamath River.

B. The BIA Maps Referred to by the Petitioner Show That the BIA No Longer Considered the Old Klamath River Reservation to Be in Existence After the 1892 Act.

The petitioner cited two maps of the Department of the Interior, compiled by the BIA in 1897 and 1898, in claiming that the BIA took the position that the 1892 act did not terminate the reservation status of the old Klamath River Reservation. PRB, 21-22. In fact, these maps show that the BIA took the opposite position.

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1. See, *e.g.*, Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs, v. II (1896), pp. 125-27; Annual Report of the Secretary of the Interior, Report of the Commissioner of Indian Affairs (1897), pp. 115-17; Annual Reports of the Department of the Interior, Indian Affairs, Report of Commissioner and Appendixes (1900), pp. 204-18.

The 1897 and 1898 maps, and also the 1892 map referred to in the petitioner's opening brief, at page 24, contain a legend indicating that an area constituting an Indian reservation is designated by brown coloration.[2] Such coloration covers the lands of the former Klamath River Reservation on the 1892 map, and also on other maps contained in the annual reports of the Secretary of the Interior through 1895. But similar coloration is also used in designating the lands of the northern half of the Colville reservation through the 1895 reports; since the latter reservation was terminated by the 1892 Colville act, according to the *Seymour* Court, the continued use of such coloration shows that the departmental cartographers were in arrears in bringing their maps up to date.

However, the annual map published by the BIA in 1896, and also the 1897 and 1898 maps referred to by the petitioner, show that the brown coloration has been removed from the area covered by the former Klamath River Reservation, and also from the area covered by the northern half of the Colville reservation.[3] The area covered by the former Klamath River Reservation is clearly distinguished on these maps from the areas covered by the Hoopa Valley reservation and the connecting strip, which retained their brown coloration. A black boundary is drawn on these maps around the area covered by the former Klamath River Reservation; but a similar boundary is drawn on the 1897 map around the northern half of the Colville reservation, thus indicating

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2. See Report of the Commissioner of Indian Affairs to the Secretary of the Interior, 61st Annual Report (1892); Annual Report of the Secretary of the Interior, Commissioner of Indian Affairs (1897); Annual Report of the Secretary of the Interior, Commissioner of Indian Affairs (1898).

These maps were affixed as appendixes at the end or near the middle of these annual reports, and carried no page number.

3. Copies of these maps have not been appended because the coloration of the maps is not picked in the photocopying process.

that this line apparently only denotes those areas in which trust allotments and Indian settlements are administered by the BIA.

Thus, the 1897 and 1898 maps clearly support the position of the respondent. The combination of these maps and the statements of the BIA officials, cited above, lead inescapably to the conclusion that the BIA regarded the former Klamath River Reservation as no longer in existence after the 1892 act. This conclusion, coupled with the recorded expressions of the 1892 Congress that the area no longer retained reservation status, amply distinguishes this case from that before the *Seymour* Court, and shows that the 1892 act terminated the reservation status of these lands.

C. The Superintendent of the Hoopa Valley Agency Took the Position in 1933 That the Lands of the Former Klamath River Reservation Were Restored to the "Public Domain."

According to the trial commissioner's proposed decision in the pending Court of Claims case, at pages 63-64, a letter written by the Special Alloting Agent of the BIA and approved by O. M. Boggess, the Superintendent of the Hoopa Valley Agency (Appendix, 13), stated,

> "The unalloted portion of [the former Klamath River Reservation] . . . was *returned to the public domain* under authority of the Act of Congress approved June 17, 1892." *Short v. United States,* pending No. 102-63 (Ct. Cl.) pp. 63-64. (Emphasis added.)

This statement shows that the BIA considered these lands as restored to the public domain by the 1892 act.

II. THE PURPOSE FOR WHICH THE KLAMATH RIVER RESERVATION WAS CREATED CEASED TO EXIST AFTER THE 1892 ACT.

The purpose for which the old Klamath River Reservation was created ceased to exist after the 1892 act was passed. The reservation had been originally created in 1855, but a flood in 1861 destroyed most of the arable land of the

reservation; as a result, many of the Indians left the area and settled elsewhere.[4] Many non-Indian settlers then moved into the lands of the old reservation, and occupied most of these lands. Congress was anxious to protect the existing claims of the settlers, and to encourage the homestead settlement of these lands; it had considered proposed legislation to that effect for many years, and most of the proposals made no provision for allotments to the Indians. See, *e.g.*, H.R. 60, 47th Cong., 1st Sess. (1881); H.R. 113, 51st Cong., 1st Sess. (1890); H.R. Rep. No. 3454, 46th Cong., 2nd Sess. (1880); H.R. Rep. No. 1354, 46th Cong., 2nd Sess. (1880). But the Department of the Interior was anxious to protect the homes of the Indians, many of whom had returned to the old reservation, against intrusion by the settlers. H.R. Rep. No. 1148, 47th Cong., 1st Sess. 2 (1882). As the Commissioner of Indian Affairs stated in his 1885 annual report.

> "It is my intention to ask at an early day for legislation suitable to the wants of these Indians. They do not need all the lands at present reserved for their use, but they should be permanently settled, either individually or in small communities, and their lands secured to them by patent before any portion of their reservation is restored to the public domain." Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior (1885), pp. XLVIII-XLIX.

To protect the Indians' homes, the Department of the Interior prevailed on the President to issue an executive order in 1891 re-creating the old reservation. See *Short v. United States, supra,* 49-50.

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4. The history of the Klamath River Reservation is described at length in *United States v. Forty-Eight Pounds of Rising Star Tea,* 38 Fed. 403 (1888); *Donnelly v. United States,* 228 U.S. 243 (1913); *Elser v. Gill Net No. One,* 246 Cal. App.2d 30 (1966); *Short v. United States,* pending No. 102-63 (Ct. Cl.); 65 I.D. 59 (1958); 33 L.D. 205 (1904).

In its original form, H.R. 38, the bill which was finally passed in 1892, provided for homestead settlement of these lands, authorized the Secretary of the Interior to "reserve" lands for the Indians' benefit, and made no provision for allotments to the Indians. At the behest of the Department of the Interior, the bill was amended in the Senate to provide for such allotments. 23 Cong. Rec. 3918 (1892). Thus, the 1892 act constituted a compromise between Congress, which wanted to promote the homestead settlement of these lands, and the Department of the Interior, which wanted to protect the Indians from expulsion from the area by the settlers.

Importantly, the Indians were not to be given the right to use the lands of the old reservation for historic tribal functions, since the lands settled by the homesteaders were to be "disposed of, as are other lands of the same class or quality, under the general laws of the United States." H.R. Rep. No. 161, 52d Cong., 1st Sess. (1892). Thus, the homesteaders were to receive a fee title to their property similar to that enjoyed by homesteaders elsewhere. This meant that the Indians were no longer entitled to enjoy the right to fish without restriction on the old reservation lands, a right which they had enjoyed when the reservation was in existence.

It is thus clear that the reservation was created in 1891 in order to protect the Indians from being expelled from the area by the intrusion of settlers. This form of protection was abandoned by the passage of the 1892 act, which sought to protect the Indians from such expulsion by the issuance of trust allotments. The issuance of the allotments was an alternative to the form of protection previously afforded by the reservation. The allotments thus eliminated the need for the continued existence of the reservation, and the purpose for which the reservation was created ceased to exist after the 1892 act was passed.

Moreover, the 1892 act only allowed the Indians to receive trust allotments on surplus lands which were not occupied by the settlers, which is evident from the fact that the act provided that such settled lands were "exempt" from such allotments. This is contrary to the situation before the *Seymour* Court, where the Court stressed that the act in question merely allowed settlers to obtain "surplus" lands which were not used by the Indians. In fact, there is no indication in *Seymour* of a congressional concern to promote settlement and protect existing claims of settlers, and the 1906 Colville act indicates that the opposite was the case. See 34 Stat. 82, § 9 (1906).

That the 1892 Congress intended to entirely abandon the protection previously afforded by the reservation is evident from the repeated congressional emphasis, both in the Senate and the House, that the reservation was already abandoned, and no longer function as a *de facto* reservation. This emphasis was apparently vital to the act's passage, since Congress was apparently not inclined to permit the intrusion of homesteaders on lands which Congress wished to continue as a reservation.

The Senate, which amended H.R. 38 to include the allotment provisions, did not regard the provision as consistent with the purposes of a reservation. The bill's spokesman in the Senate repeatedly emphasized that the old reservation was not considered as in existence anyway. Furthermore, the bill, even though containing the allotment provision, was not expected to promote tribal cohesion; the Senate spokesman declared during the congressional debate that "[t]here is an Indian reservation within 20 miles of the river, where these Indians can go if they want to do so." 23 Cong. Rec. 3919 (1892). As anticipated by the Senate, many of the Indians left the old reservation after the act's passage, and, as noted by the Department of the Interior, "were relocated on the connecting strip and elsewhere, and

the Klamath River Tribe became widely scattered." 65 I.D. 59, 64 (1958).[5]

The dominant motivation behind the 1892 act, from the congressional standpoint, was, of course, to promote the rapid settlement of the lands of the old reservation by the homesteaders. The allotment provision was added to H.R.-38 as an amendment, and it can hardly be asserted that the amendment reveals the dominant congressional purpose. In fact, under section 334 of the General Allotment Act of 1887, Indians on the old reservation were entitled to allotments even if the area lost its reservation status, (25 U.S.C. § 334), and hence this amendment did not change the basic nature of H.R. 38.

Even the Department of the Interior, which successfully campaigned to have the allotment provision inserted in the act, did not regard the provision as consistent with the purposes of the reservation. A bill similar to H.R. 38 was submitted to Congress in 1881 (H.R. 60, 47th Cong., 1st Sess. (1881)), and the Commissioner of Indian Affairs indicated that he would oppose the bill unless it was amended to include an allotment provision. In urging the amendment, the Commissioner, who took the position that the reservation was actually in existence at that time (*United States v. Forty-Eight Pounds of Rising Star Tea,* 38 Fed. 403, 405 (N.D. Cal. 1888)), stated,

> *"The lands embraced within the said reservation are not needed (as a reservation) for Indian purposes,* but that the Indians residing thereon should be protected in the peaceful occupancy and enjoyment of their homes . . . is certainly beyond dispute." H.R.

5. The petitioner, in his closing brief, argues that this departmental decision was impeached in many particulars by the trial commissioner's recommendations in the *Short* case (PRB, 18), an interesting argument in light of the petitioner's reliance on the departmental decision in his opening brief (p. 23). In any event, the *Short* commissioner, while questioning many findings in the departmental decision, did not question the specific finding quoted above.

Rep. 1148, 47th Cong., 1st Sess. 2 (1882). (Emphasis added.)

Thus, the Comissioner, who was responsible for the inclusion of the allotment provision in H.R. 38, regarded the allotment provision as an alternative form of protection to that afforded by the reservation, as did Congress.

We are mindful that the mere allowance of trust allotment, in attempting to end nomadic ways of the Indians, does not in itself terminate a reservation. *United States v. Celestine,* 215 U.S. 278 (1909). In fact, section 331 of the General Allotment Act of 1887 expressly provides for the creation of "allotments on such reservations." Given other circumstances, however, the allowance of such allotments can constitute part of an overall congressional effort to end federal supervision over an entire reservation area, and hence end the reservation itself. *United States v. Pelican,* 232 U.S. 442 (1914). Here, such an effort is evident from the repeated congressional emphasis of the non-reservation status of these lands, from the fact that the dominant purpose behind the act was to promote the homestead settlement of these lands, and—most importantly—from the fact that the purpose for which the reservation was created ceased to exist after 1892. These facts amply distinguish this case from that before the *Celestine* and *Seymour* Courts. At the very least, these circumstances explain the BIA's failure to treat this area as a reservation, beyond administering the trust allotments, in the years following the passage of the 1892 act.

III. THE MAP CONTAINED IN THE 1909 PRESIDENTIAL PROCLAMATION EXCLUDES THE LANDS OF THE FORMER KLAMATH RIVER RESERVATION FROM THE HOOPA VALLEY EXTENSION.

The petitioner has contended that the map contained in the 1909 presidential proclamation, appended to the

respondent's opening brief as Appendix A, does not show the boundary line of the Hoopa Valley reservation extension as excluding the lands of the former Klamath River Reservation. PRB, 22. The petitioner claims that other maps appended to the respondent's brief show the northern boundary of the extension as extending into Township 12 North, whereas the map contained in the presidential proclamation shows the northern boundary of the extension as only extending into Township 11 North. In fact, the quadrangle map prepared by the Geological Survey, appended to the respondent's brief as Appendix C, clearly shows the northern boundary of the extension as only extending into Township 11 North, and not as extending into Township 12 North. Also, both maps show the northern boundary of the extension as falling between Range 2 East and Range 3 East. Hence, the boundary line on the map contained in the presidential proclamation clearly denotes the northern end of the extension.

The petitioner also claims that the presidential proclamation states that the "lands shown on its maps 'constitute a part [not all] of the Hoopa Valley Indian Reservation.'" PRB, 22. However, the proclamation, in referring to the lands constituting a "part" of the reservation, expressly referred only to those "certain lands" which were thereafter to be included in the Trinity National Forest, not to all the lands shown on the maps. See Brief for the Respondent, Appendix A, p. 1. That is, the small, individual blocks of land shown on the map, which were thereafter to be included in the national forest, only constituted a "part" of the reservation, and obviously did not constitute the entire reservation. Thus, the petitioner has misread the terms of the proclamation.

IV. THE DECISION OF THE DEPARTMENT OF THE INTERIOR CITED BY THE UNITED STATES IS NOT HELPFUL IN DECIDING THE ISSUE BEFORE THIS COURT.

The United States, although not having filed its brief in this matter at the time that the Respondent's Supplementary Brief was prepared, has informally indicated to the respondent that it intends to cite an administrative decision of the Department of the Interior contained in 33 L.D. 205 (1904). This decision dealt with the question whether an allotment issued under the 1892 act was located on or off the former Klamath River Reservation, for purposes of determining whether section 1 or section 4 of the General Allotment Act of 1887 applied to the allotment. The decision concluded that the old Klamath River Reservation remained in effect after the 1892 act, and hence that the allotment was covered by section 1 of the 1887 act. The reasoning contained in the decision is of little help in resolving the question here. The decision is expressly limited to a construction of the bare language of the 1892 act, and expressly noted that "subjects of historical interest" were not of "controlling importance" in its conclusions. 33 L.D. at 219. In construing this statutory language, the decision placed its primary emphasis on the single allusion in the act to Indians residing on "said reservation." *Ibid.* This seems a frail basis for the conclusion described in the decision.[6] It ignores the many other references in the

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6. The opening brief for the respondent pointed out that this single statement was a reference back to lands "in what was [the] Klamath River Reservation," and that the use of the past tense in this latter reference indicates that the former reference is not intended to imply that the lands should continue to retain reservation status. Brief for the Respondent, p. 15, n. 5. Moreover, the decision's interpretation of this single statement is clearly inconsistent with the obvious congressional understanding that the area no longer constituted a reservation.

act to the "lands" on which the Indians reside,[7] ignores the use of the past tense in describing the Klamath River reservation and ignores the repeated statements of the act's authors that the reservation was not considered to be in existence. It also ignores the act's failure to refer to the lands as being restored to the "public domain," which the petitioner urges as the primary similarity between this case and *Seymour*. Either this shows that the administrative decision failed to consider the factors which *Seymour* found persuasive, and thus that the decision is of little help here, or that the decision considered the absence of such terminology to be unimportant in light of the act's overall effect, as urged by the respondent. In any event, this Court is certainly competent to evaluate the bare language of the statute for itself, and thus the reasoning supplied by the decision is of little help here.

The decision is entitled to a certain historical significance, of course, by the mere fact that it represents a departmental viewpoint at an early date. However, this significance is greatly reduced by the fact that the BIA, which is responible for administering reservation lands, did not regard the former Klamath River Reesrvation as in existence, and did not administer it as such. Also, since the decision was issued to the General Land Office, the forerunner of the Bureau of Land Management, the decision apparently assumed no significance in the actual administration of lands in the Hoopa Valley area by the BIA. Certainly the BIA's actual practice in supervising its Indian wards is more persuasive than a legal construction of the language of the 1892 act in evaluating the administrative response to the act. Hence, the decision should be accorded little significance in deciding the issue here.

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7. Congress continued to use the word "lands," and avoid the use of the word "reservation," in referring to the former Klamath River Reservation in later acts. In 1917, Congress, in amending the provision of the 1892 act relating to the distribution of proceeds to the Indians, referred to "Indians and their children now residing on said lands . . ." 29 Stat. 976.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the California Court of Appeal should be affirmed.

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